HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Revision No. 27 of 2004

Hiraballabh Bhatt ..... Revisionist

Versus

State of Uttaranchal & another ..... Respondents

Sri M.C. Pandey, Advocate for the revisionist
Standing Counsel for the respondents.

Dated: 1`1.8.2004

Hon. Rajesh Tandon J.

Heard the learned counsel for the parties.

Present revision has been filed against the order dated 11.5.2004 passed by the Civil Judge (SD), Nainital by which application filed by the plaintiff for not accepting the Written statement has been rejected.

Briefly stated the facts giving rise to the present revision are that the plaintiff revisionist has filed a suit in the Court of Civil Judge (SD), Nainital in which order was passed that the case may be put up for issues on 11.11.2003. The order sheet shows that on 11.11.2003, the Court was vacant and 8.12.2003 was fixed. Thereafter 30.12.03 was fixed and on 30.12.03 time was again granted for filing of the written statement and ultimately on 21.2.2004 the following order was passed:

" Adjournment allowed as given a last opportunity fix 8.3.04 for W.S. & issues."

On 8.3.2004 again time was given for filing W.S. on a costs of Rs.150/- which was duly accepted by the counsel for the plaintiff. Ultimately on 27.3.2004 written statement was filed. Thereafter on 2.4.2004, the plaintiff filed application under Order 8 Rule 1 C.P.C. which has been rejected vide order dated 11.5.2004. Feeling aggrieved the plaintiff has preferred the present revision.

The counsel for the plaintiff revisionist has submitted that in view of Order 8 Rule 1 C.P.C. statutory period for submitting written statement being 30 days or 90 days, therefore, the Court has no jurisdiction to entertain the written statement and the same is liable to be struck down from the record of the case.

Order VIII Rule 1 C.P.C. reads as under:

1. ***Written statement-*** *The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.*

   Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in written but which shall not be later than ninety days from the date of service of summons.

The word 30 days has been inserted by virtue of Code of Civil Procedure (Amendment) Act, 2002 which provides that the written statement shall be filed within 30 days but the court may allow further time to file written statement for reasons to be recorded in written but it shall not be later than ninety days from the date of service of summons.

In the present case the Presiding officer of the court was not present on 11.3.03 till 8.12.03 and when the Presiding officer was himself absent there was no occasion to record the statement in the order sheet that written statement is to be filed on that date. Even on 30.12.2003, the Court was vacant. On 21.2.04 time has been allowed to file written statement as last opportunity and within a period of 90 days written statement has been filed.

The suit was filed on 6.10.2003 and on 29.10.2003 service was effected on the defendant and therefore, 6.10.03 when the order was passed for filing written statement there was no service of summons on the defendant. In the present case after service of summons the Court was vacant and ultimately on 24.2.04 when time has been granted to the defendant 90 days have not expired. During intervening period costs of Rs.150/- was also accepted by the plaintiff.

Order VIII Rule 10 provides procedure when party fails to present written statement called for by Court, it reads as under:

10. Procedure when party fails to present written statement called for by Court:- *Where any party from whom a written statement is required under Rule 1 of Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up.*

In the present case the Court has permitted to file written statement on 21.12.2004 subject to awarding of costs which was duly accepted by the plaintiff, the written statement has been filed on 27.3.2004 and as such compliance of Order VIII Rule

10 has been made. The Court has accepted the written statement when it was filed and it was not within the competence of the court to say that the written statement has not been filed.

Counsel for the revisionist has relied upon the judgment of Karnataka High Court in the case Smt. Savitha Gupta vs. Smt. Nagaratha and others AIR 2003 Karnataka 426, where the defendant has failed to file written statement within time. Karnataka High Court has held that O. 8 Rule 1 is mandatory. The Court has observed as under:

"The consequence of not filing of the written statement within the time prescribed under Order VIII Rule 1 is provided under Order VIII Rule 10 CPC which reads as under:

> 10. Procedure when party fails to present written statement called for by Court:- *Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up.*

12. *Order VIII Rule 10 provides the consequence for non compliances with order VIII Rule 1 CPC and therefore, it ahs to be held as mandatory (See Maqbool Ahmad vs. Onkar Pratap Narain Singh AIR 1935 PC 85 at page 88 & Secretary of State vs. Kuchwar Lime & Stone Co. Ltd. AIR 1938 PC 20 @ page 22. The constitutionality of the amended provisions of the CPC has been upheld by the Supreme Court in the case of*

Salem Advocate Bar association vs. Union of India AIR 2003 SC 189. In paragraph 4 it has been held that-

"In the petitions, the amendments, which were sought to be made, by the aforesaid amendment Acts, have been challenged, but we do not find than the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone though the provisions by which amendments have been made and do not find any constitutional infirmity in the same."

Sri M.C. Pandey has further referred the case of Dhanajaya Reddy vs. State of Karnataka (2001) 4 SCC 9 in which the Apex Court has held that where the law requires a thing to be done in a certain manner, it has to b done in that manner or not at all. Power must be exercised in the manner provided by the statute.

The Apex Court in AIR 1955 SC 425, Sangram Singh vs. Election Tribunal Kotah and another held as under:

"(32) We have already seen that when a summons is issued to the defendant it must state whether the hearing is for the settlement of issues only or for the final disposal of the suit (O.5 r.5). In either event O.8 R.1 comes into play and if the defendant does not present a written statement of his defence, the Court can insist that he shall and if, on being required to do so, he fails to comply-

"the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit" (O.8 R. 10)

This invests the Court with the widest possible discretion and enables it to see that justice is done to 'both' sides; and also to witness if they are present: a matter on which we shall dwell later.

(34)Now when we speak of the ends of justice, we mean justice not only to the defendant and to the other side but also to witnesses and other who may be inconvenienced. It is an unfortunate fact that the convenience of the witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a Court orders him to come to the assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave his family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in an out of the way village and may have to trudge many weary miles on his feet.

And when he gets there, there are no arrangements for him. He is not given accommodation and when he reaches the Court, in most places there is no room in which he can wait. He has to loiter about in the verandahs or under the trees, shivering in the cold of winter and exposed to the heart of summer, wet and miserable in the rains; and then after wasting hours and sometimes days for back and come again another day his turn, he is brusquely told that he must go back and come again another day. Justice strongly demands that

this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the over all picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross examine them, still less the adduce his own evidence. It all depends on the particular case.

But broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in other the Court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary."

In view of the above provisions of Order 8 Rule 1 having been complied and the defendant has filed the written statement within the time permitted by the Court after awarding the costs, I find no infirmity in the order passed by the trial Court. The revision has no force and is hereby dismissed. No order as to costs.

(Rajesh Tandon J.)

11.8.2004
*Dhyani